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Nos. 19 and 34.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

THE FIRST NATIONAL BANK IN PLANT CITY,
Petitioner,

v.

FRED O. DICKINSON, JR.,
Comptroller of the State of Florida, et al.

WILLIAM B. CAMP,
Comptroller of the Currency,
Petitioner,

v.

FRED O. DICKINSON, JR.,
Comptroller of the State of Florida, et al.

REPLY BRIEF FOR PETITIONER

The First National Bank in Plant City.

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The First National Bank in Plant City.

The purpose of this reply brief is to correct an important misstatement of fact and to respond to several arguments raised in the brief of respondents, Fred O. Dickinson, et al.

I. Respondents premise much of their argument on the factual base that the messenger pick-up and delivery service at issue in this case is "essentially the same" as the "teller window" operation conducted by some banks prior to passage of the McFadden Act in 1927 (Brief, p. 17). This premise is essential to respondents' argument that it is immaterial whether deposits are actually received, checks paid or money lent (within the meaning of 12 U. S. C. 36 (f)) by First National's messenger since the messenger operation nevertheless constitutes "the heart of banking" (Brief, p. 24) and is, in fact, precisely the evil which Congress sought to legislate against in 1927.[1]

The legislative history of the 1927 Act, which extends back to 1924, totally belies this assumption. In all the lengthy legislative debates and hearings on the subject of the nature and effect of branch banking, virtually no reference can be found relating to the kind of convenience functions customarily performed off-premises by agents or employees of a bank before and since the 1927 legislation. The difference between those two categories of off-premises operations had been described by the Attorney General of the United States as the "vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business," 29 Ops. Atty. Gen. 81, 87 (1911).

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[1] The Government's briefs herein amply demonstrate that the 1927 legislation was intended to **expand** the powers of national banks, not to limit them. Additional acknowledgment of this attitude appears in the volume *Banking Studies* prepared in 1941 by members of the staff of the Federal Reserve Board. The paper dealing with the McFadden Act, written by Walter Wyatt, then General Counsel of the Board observes that:

> "Repeated efforts were made to put national banks on a basis of competitive equality with state banks by increasing their powers and by subjecting state member banks to some of the restrictions applicable to national banks . . ." (p. 50).

On the contrary the debates focused exclusively on two kinds of acknowledged branches then in operation. State banks in at least 18 states were at the time permitted to operate full service branches in the sense that such branches are known today, 67 Cong. Rec. 2833-2837 (1926). In addition, by administrative ruling, the Comptroller of the Currency had authorized national banks to establish "additional offices" or "teller windows." These "teller windows" were somewhat more limited in their permitted functions than were the full service branches. They were, however, specifically authorized by the Comptroller's regulation to receive deposits and pay checks[2] in addition to their various other functions.

"Teller windows" were not established in great numbers throughout the country but they did flourish in New York City and it is their manifestation there which was repeatedly alluded to by the legislators debating the proproposed McFadden Act. Indeed, two of the New York City Congressmen described them in terms which make dramatically clear how different they were in concept and operation from the messenger service conducted by the First National Bank in Plant City. Congressman LaGuardia described them as follows:

> "Year after year the number of teller windows are increased in the cities. They are not teller windows in any sense of the word. They are real complete banking establishments . . . Monumental buildings, with a vice president in charge, with complete banking departments are instituted under the guise of teller windows." 67 Cong. Rec. 3230 (1926).

Another colloquy on the floor of the House among several members including Messrs. Celler and O'Connell of

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[2] Regulations of the Comptroller of the Currency relating to establishment of additional offices by national banks, ¶ 7, October 26, 1926, reproduced in Collins, *The Branch Banking Question*, App. B (1926).

New York further illustrated the real nature of "teller windows".

> Mr. Celler: We have, for example, the Public National Bank in New York that has established 19 "teller windows." They call them teller windows, but they are large monumental establishments costing fortunes to build . . .
>
> Mr. Wainwright: Are those teller windows in effect branches?
>
> Mr. Celler: Absolutely, in effect they are branches where they receive deposits and lend money, discount, and do an actual banking business. They make no bones of it . . .
>
> Mr. O'Connell of New York: They are separate establishments?
>
> Mr. Celler: Yes.
>
> Mr. Stevenson: If the gentleman will bear with me, I will show where we stop that very thing under this proposed act. Under this bill any place is a branch where checks are received, deposits are received, or money loaned. 67 Cong. Rec. 2860 (1926).

Respondents' statement that "(t)he off-premises banking operations involved here are essentially the same as the teller windows" (Brief, p. 17, n. 16) is, therefore, simply not true. The "teller windows" were specifically authorized to perform many essential banking functions such as receiving deposits and paying checks and, in fact, did so in large banking offices under the supervision of high-ranking bank officers. On the other hand, the service authorized by the Comptroller's ruling and actually performed by First National is specifically prohibited from incorporating the functions of receipt of deposits, payment of checks and extension of credit, the functions which are the real "heart of banking." The services rendered by First National's messenger pursuant to Rule 7490 are

plainly in the category of incidental agency activities traditionally authorized to national banks off-premises.

To understand just how different the operation of First National's messenger and receptacle services are from "teller window" or full-service branch operations in concept and practice, as well as in form, it is important to take note of a number of facts established in the record below.

The messenger truck is no more than a standard armored car (App. 131) with design features customary on cars made by the same manufacturer (App. 86). The window and sliding drawer on the side of the truck have never been used (App. 58, 134), are not intended to be used (App. 87) and, indeed, are currently inoperable (App. 87). The truck was purchased by the Bank, at least in part, because the cost of independent armored car transport service in the Plant City area was prohibitive to small retailers (App. 80). First National has, from the beginning, contemplated making a separate charge to its customers for providing the delivery service (App. 103) and the customers have been so advised (App. 68). The truck is not regularly, or even periodically, manned by an officer of the Bank (App. 65). The functions which the messenger riding on the truck is authorized to perform are very strictly limited to the ministerial ones of physically receiving from the customers bags or envelopes to be transported to the Bank for deposit, and handing to the customer cash which has previously been withdrawn from his account (App. 53 et seq.). The truck never carries any currency other than that which has been previously ordered by a customer and debited to his account at the Bank (App. 100-101). No bonds are serviced or travelers checks sold by the messenger (App. 110). Loan payments are not received by the messenger nor is he authorized to receive them (App. 59, 98). Cash or cash items brought

back to the Bank by the messenger are not considered to have been received until the transmittal slip which must accompany them has been validated by a teller other than the messenger (App. 53, 58) and the transmittal envelope opened, and its contents counted and verified at the Bank (App. 95). Similarly, before cash can be sent to a customer by way of the truck, the Assistant Cashier at the banking house who knows the account in question must approve the preparation of a charge slip to the account (App. 54). The only other functions, besides the pick-up and delivery of funds, which the truck has performed are the bi-weekly delivery of cash letters to one of the respondent banks (App. 64) and the delivery of strawberries to friends of the Bank in St. Petersburg and Tampa (App. 69). There has been no discussion of extending the services now performed by means of the armored car and receptacle operations (App. 71).

From the preceding evidentiary description of First National's operations, it is obvious that they bear no resemblance either to branch offices at which "vital" or "life-blood" banking functions are performed or to so-called "teller windows." Respondents' argument that the contractual arrangement between the Bank and its customers is just a subterfuge to cloak important off-premises banking functions is thus exposed as merely argument without factual substance.

II. Respondents have conceded that 12 U. S. C. 36 (f) contains the "broad, functional test of a branch" (Brief, p. 10).[3] It follows that in order to classify First National's messenger and receptacle operations as a "branch" it must be shown either that these operations involve the

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[3] Respondents concede this point even though the Court of Appeals reached a different conclusion and the amicus National Association of Supervisors of State Banks supports the Circuit Court's view.

§ 36 (f) functions or that, for some reason, the federal definition does not apply to this situation.

Respondents argue that First National's messenger is receiving deposits off-premises inasmuch as, through him, the Bank effects "receipt and control of money" (Brief, p. 24). The cases cited in First National's main brief (pp. 25-27), however, demonstrate that the mere receipt of money by a bank employee or even a bank officer does not constitute the receipt of deposits unless the parties so intend.[4] That First National and its customers do not so intend is clear from the contracts they enter into. Respondents concede that "(d)eposits are clearly a matter of contract" (Brief, p. 28).

Indeed, the Supreme Court of Florida has recently rejected the argument that receipt and physical control of money by an agent of a financial institution constitutes receipt of a deposit. The Court found that Florida Statute 659, the general banking statute, of which the section on which respondents base their case is a part,

> "rather definitely reveals a legislative intent to deal with deposits in the orthodox banking connotation as the placing of money in the hands of a financial institution for safe-keeping with a resultant creation of a

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[4] It has long been recognized that the use of agents to collect money off-premises for deposit does not constitute branching. Thus more than fifty years ago the Supreme Court of Kentucky referred to the "wide difference" between the two activities:

> "There is a wide difference between the appointment of agents to receive and collect money and forward it to the bank or to transact other business necessary or incidental to banking and the right to establish branch banks at which a general banking business is carried on. A bank may have as many duly appointed agents as its needs require, and these agents, among other things, may receive and forward to it at its place of business the money of persons who desire to deposit with it." *Bruner v. Citizens Bank of Shelbyville*, 134 Ky. 283, 298, quoted at 29 *Ops. Atty. Gen.* 90 (1911).

> debtor-creditor relationship." *Greater Miami Financial Corporation v. Fred O. Dickinson, Jr.*, 214 So. 2d 874 (1968).

In ruling against the Florida Comptroller's contention that the activities of a "savings account broker," who collected funds in Florida for deposit with an out-of-state savings and loan association, constituted the receipt of deposits in violation of § 659, th Court continued:

> "Additionally, the placing of money with appellant by its customers is not a deposit within the contemplation of the *Banking Code,* of which Chapter 659 is a part. In the sense used in the Code a deposit creates evidence of an obligation to pay money to the depositor by the depositary . . . When a customer delivers money or a check to the broker for forwarding to the non-resident savings and loan association no creditor-debtor relationship is established . . . The broker acts merely as the transient custodian of the funds for the sole and only purpose of sending them on to the intended out-of-state depositary." (ibid.)

In addition, at page 32 of their Brief Respondents assert that "the Federal Branching Act deals with practical matters of control and disposition of money". The statement is baseless. Neither the language nor the legislative history of the Act make any such statement. In the sense that respondents use the word "control", a Brink's messenger or a postman would be engaging in branch banking. It is absurd to argue that such activities were on the minds of the framers of the McFadden Act.

Respondents' additional argument that the Bank is not in an agency relationship with those customers using the messenger service prior to receipt of the funds at the banking house is not persuasive, and in any event is immaterial to the issues in this case. Respondents' cases deal

with verbal arrangements which courts have found to be overcome by conflicting factual evidence. Here the Bank and its customers by written contract agree that the Bank transports the funds "as messenger and agent for" its customers (App. 123). Nor do the characteristics of First National's messenger service conflict with an agency relationship. Insofar as the funds being transported are concerned, the messenger acts for the benefit of the customer in accordance with the Comprehensive Dual Control Contract entered into by the customer. There is no conceptual difference between the Bank's limited agency function here and its role in a managing agency account through its Trust Department or as escrow agent in connection with real estate loans.

Respondents cannot and do not argue that the contracts between First National and its customers do not mean what they say. Instead, they are reduced to arguing repeatedly that the position of First National and the Comptroller of the Currency is a "subterfuge" and based on "legalisms" or "legal technicalities". This is a strange argument. It is clear that none of the essential banking functions which normally distinguish a branch office operation is performed by First National's messenger either on its truck or at the receptacle. The fact that the pick-up and delivery of funds are related to the basic deposit function does not equate them with that function any more than does the visit of a bank officer to a new business seeking its deposit account.

What First National has done by the contractual arrangements it has entered into with its customers is simply to assure that the customers understand that only the ministerial function of transport is being provided in order that no misunderstandings may arise, as to the status of the funds being transported. As such, the contracts clearly do serve a "legitimate business purpose" in defining the

relationship between the parties.[5] To the extent that "legalistic" language is used in these contracts, it is essential and customary in establishing the point at which the deposit liability relationship arises.

In the 1962 case of *Camden Trust Co. v. Gidney*, 301 F. 2d 521 (D. C. Cir.), cert. den. 369 U. S. 886 (1962) the argument was made that a new "affiliate" of a national bank was in reality a branch because it had many of the characteristics of a branch. The Court rejected this contention finding that the affiliate operation was created pursuant to other "legitimate objects contemplated by the Act" (301 F. 2d 524) and was distinguishable in certain essential respects from a branch. The same answer to the "subterfuge" argument is applicable here. The fact that a different method of operation might in-

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[5] Indicative of the need to define the precise nature of the relationship of the customer and the bank is respondents' suggestion (Brief, pp. 19-20) that the funds transported may be "special deposits". A special deposit is defined as a deposit for safekeeping.

> "It is the placing of money, bonds, notes, or other property of high value and small dimensions, such as a violin, in the custody of the bank, with the duty to return the specific thing deposited. It is to be kept in the same form, and is not to be commingled with the general assets of the bank." 5 Zollman, *Banks and Banking*, 77-81 (1936); accord: *Parker State Bank v. Pennington*, 9 F. 2d 966 (8th Cir., 1925).

If a special deposit were indeed created by First National's action in picking up funds from its customers it would be incumbent upon the Bank to return the actual currency or cash items picked up. Obviously, no such result is intended here. It is to avoid such misunderstandings that courts have regularly held that a special deposit is created only by the express or implied agreement of the parties that the deposit "shall remain segregated from the general funds of the bank". *Busher v. Fulton*, 191 N. E. 752; accord: *Keyes v. Paducah & I. R. Co.*, 61 F. 2d 611 (6th Cir., 1932). The absence of such an agreement creates a strong presumption that no special deposits were intended. *Thompson v. Beitia*, 69 F. 2d 356 (9th Cir., 1934). Furthermore, the deposit contracts make clear that no deposit relationships of any kind, either special or general, are created until the funds transported by First National's messenger are received at the banking house. Prior to that time the Bank holds the funds in an agency capacity, a form of bailment.

volve the actual receipt of deposits does not render it a subterfuge to choose a method which does not.

CONCLUSION.

Issues of great importance to the national banking system as a whole are presented by the decision of the Court of Appeals in this case. It is significant, however, that the case arises out of the attempt by a small bank in a small community to provide a convenience service to its customers spread through the town and surrounding rural areas. The effect of the Court of Appeals' decision, in Florida at least, will be to prohibit such small national banks from performing any service[6] off-premises no matter how far removed from the essential banking functions which were so obviously on the minds of the framers of the McFadden Act. Such a result serves no purpose other than the continuation of restraints on banking competition and expanded customer service.

Respectfully submitted,

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[6] The Court below observed that even "minimal" services off-premises are forbidden by the state's law. This interpretation of Florida statute 659.06 is dubious. However, in view of the Court's deference to the State Comptroller's similar construction of the statute no forum for rebuttal is realistically available to petitioner.